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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1274

LEHIGH VALLEY RAILROAD CO.,
Petitioner,

WM. SPENCER & SON CORPORATION,
Respondent.

On petition for a writ of certiorari to the
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WM. SPENCER & SON CORPORATION IN OPPOSITION

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Opinions Below

The opinion of the District Court is set forth at page 467a, Petitioner's separate appendix.

The opinion of the Court of Appeals for the Second Circuit is set forth at pages 13, Petitioner's Petition and is reported at 387 Fed. 2d 623.

Jurisdiction

The judgment of the Court of Appeals was entered on December 29, 1967. The jurisdiction of this Court is invoked under Section 1254(1) of 28 U. S. Code.

Questions Presented

1.) Does a stevedore found free from negligence by the jury, owe a shipowner, who is obligated to furnish a seaworthy vessel, an affirmative obligation of inspecting the vessel for defects before sending its men aboard?

2.) Can a shipowner, obligated to furnish a seaworthy vessel, assure the stevedore the vessel is safe and then seek indemnity from the stevedore who relied upon such assurance?

Statement

After jury trial, verdict in the sum of $75,000 was rendered in favor of plaintiff against defendant, Lehigh Valley Railroad Co. (Lehigh), and in favor of the third-party defendant, Wm. Spencer & Son Corporation (Spencer) dismissing the third-party complaint.

In answer to special questions submitted to it, the jury found (1) that Lehigh's vessel was unseaworthy; (2) that Lehigh was negligent; (3) that said unseaworthinesss or negligence was a proximate cause of plaintiff's accident; (5) that plaintiff was not guilty of negligence contributing to the accident; and (8) that no negligence of any employee of Spencer contributed to the accident (470a-471a).

The Court of Appeals for the Second Circuit unanimously affirmed the judgment.

Facts

On March 21, 1961, plaintiff, a longshoreman or chenango in the employ of Spencer, was injured while working on Barge No. 79, owned by Lehigh and berthed at Jersey City (31a, 95a, 96a). The gang in which plaintiff worked consisted of 7 men, plaintiff, whose job it was to put paper on the floor of the barge, being the only

one who was working aboard the barge. The other members of the gang were 2 hi-lo operators and 4 men who worked ashore. Plaintiff had gone aboard No. 79 about a half-hour before the accident occurred and was working toward the stern on the offshore side of the vessel (96a, 97a, 98a, 99a, 101a, 108a, 132a).

There were 4 doors on this covered barge, one toward the stern on each side and one toward the bow on each side. Running across the barge between the bow doors was a runway of planks raised about 2 inches above the deck boards which ran from bow to stern (66a, 99a, 102a, 134a, 137a).

Plaintiff had started working near the stern and had moved forward, laying paper but had not yet reached the runway. A hi-lo, operated by Paige, one of the hi-lo operators in plaintiff's gang, drove from the pier onto the barge with bales of hops, drove across the runway at the bow doors and was about to turn left to go toward the stern to where plaintiff had laid the paper when the left front wheel of the hi-lo went into a hole formed by a piece of missing plank from the runway and the load fell off, part of it striking and injuring plaintiff. The hole was described as 16 to 18 inches long, about 8 to 10 inches wide (a plank being that wide) and 2½ to 3 inches deep (100a, 102a, 104a, 106a, 134a, 135a, 137a, 139a, 166a, 167a, 171a, 175a, 176a, 177a, 178a, 179a, 180a, 181a, 336a).

No employee of Spencer, including plaintiff and his superior, Anthony Skiba, the freight checker, had any knowledge of the condition which caused the accident (109a, 131a, 132a, 170a, 336a, 343a).

Audrey Walter, Lehigh's barge captain aboard No. 79, was in charge of said vessel which was at least 45 years old. His duties were to check cargo in and out, to see that the barge was in good condition, having no leaks or serious damage, and to make weekly inspections and reports and to report any condition he felt needed repairs

(32a, 46a, 65a, 314a). He described the condition he saw after the accident where the hi-lo lost its load as a chip of board 8 to 12 to 18 inches long, 3 inches wide and about ½ inch thick and had existed 2 or 3 months. He claimed he did not consider this such a condition as warranted repair and made no mention of it in any of his reports (32a, 33a, 41a, 42a, 46a, 47a, 57a, 67a, 76a, 77a), although he was supposed to report such a condition as described by plaintiff's witnesses (65a).

Charles Parrino, LEHIGH'S Marine Inspector, allegedly made periodic inspections and went aboard No. 79 some time after the accident and looked at the area the barge captain pointed out as the site of the accident and the deck sheeting was in good condition but he had no way of knowing if this was where the accident occurred. He agreed that had such a defect as testified to by plaintiff's witnesses existed, it would have been his duty to order it repaired (298a, 311a, 313a). The jury could find from his testimony a haphazard system of inspection, no records being made of any inspections, when and if made.

Anthony Skiba had not been aboard No. 79 prior to the accident. Since the barge was to be loaded with hops, it must be odorless and the floor clean. That is all he'd be interested in, it not being his duty to inspect the barge deck for defects. He went to the pier to check to make sure they had the right barge. He testified, and his testimony was not refuted by Lehigh's barge captain, that he did not check aboard No. 79 to ascertain whether it was odorless and the floor clean because when he reached the pier where No. 79 was berthed, he met Captain Walter coming to the open door of No. 79 and asked: "Captain, is there anything on the barge? Is it empty, empty pallets, or something that has to be removed?" to which Walter replied: "Nothing on there". Skiba asked: "Does the barge have any odor or something?" and Walter replied: "No. It's perfect, clear. All set"; "It's in perfect shape"

(323a, 328a, 329a, 330a, 331a, 374a, 377a, 378a, 379a). So, he didn't check because the captain assured him the barge was O. K. (331a, 378a, 379a).

> "Well, to tell you the truth it wasn't necessary to look at the flooring or anything. The captain said it was clean and odorless and it was safe to start working the boat." (323a)

As noted, no attempt was made by Lehigh to refute said testimony nor is any claim made by Lehigh that the conversation testified to by Skiba did not take place.

POINT I

There was no breach by Spencer of its contract.

Lehigh argues that Skiba, Spencer's checker, had no right to rely upon the representations of its barge captain, Walter, in assuring Skiba that the barge was odorless, clean and safe to work on, predicating its argument on the premise that Walter, whom it had put in charge of its barge and who was under a duty to inspect the barge for defects in its deck was a "deck hand" or "laborer."

Said argument is based upon two untenable premises since (1) the duty to inspect and report conditions of the barge deck were within the duties given to Walter by Lehigh and involved nothing intricate and (2) there was no duty on Spencer to inspect the barge prior to letting its men aboard.

(1)

Lehigh relies upon *Hutton Co.* v. *Arrow Bldrs. Supply Corp.*, 371 Fed. 2d 944 (C. A. 2), arguing that Walter was a laborer or deckhand. But the Court did not hold, as Lehigh would infer, that in no case can an employer be

liable for his judgment. The Court specifically noted (p. 948):

> "* * * Generally the courts have held a bargee is responsible to his employer for actions in which he participated *if the result was attributable to the exercise of his judgment in a matter which he is deemed capable of judging.*" (italics added)

Lehigh, which made as part of Walter's duties the inspection of the barge and the reporting of such conditions as he deemed necessary of repair, deemed him capable of judging in this matter. Nor was this a condition demanding such knowledge as such a person, a barge captain with years of experience, would be incapable of.

Nowhere in the *Hutton Co.* decision did the Court hold that the matter there, determining whether it was safe to change the barge's position at the dock by using the current and judging whether it was running up or downstream, was not such a matter which the barge captain was capable of judging since this determination was not necessary for the Court's decision in favor of the barge owner; rather, the holding was based on absence of reliance by respondent's employees upon anything the barge captain did or said:

> "* * * But here it is Arrow's claim that the inactivity of the quiescent bargee while Arrow's employees negligently damaged the barge makes the barge owner liable for damages to his own barge. As the district court points out, the bargee merely interposed no objection to the action taken by Arrow's employees and took no active part in the operation that Arrow was performing for Arrow's sole convenience.
>
> Here there is nothing in the record to show that Arrow's employees relied in any way on the bargee's judgment or his beliefs about which direction the tide was running. The participants were all employees of

> Arrow who wished to unload cargo belonging to Arrow and relied upon their own judgment and beliefs as to how best to accomplish the end desired."

In *Hastorf Contracting Co.* v. *Ocean Transp. Corp.*, 4 F. 2d 583, aff'd 4 F. 2d 584 (C. A. 2), cited in the *Hutton Co.*, case, *supra*, Judge Learned Hand stated (1), page 584:

> "No doubt the line will always remain hazy; it is impossible to say just what the bargee must know. Such simple things as handling the lines, warping the barge to a safe berth, avoiding known dangers (*Morey* v. *New Rochelle*, 254 F. 425, * * * (C.C.A. 2)), pumping, covering the hatches, stopping the load at the barge's capacity, and other matters fairly within the competence of the ignorant men who man such craft—all these and no doubt many more may be charged to them."

Lehigh, having itself assigned this duty to Walter, cannot argue that he is incapable of determining visually the condition of the vessel and whether it is safe for longshoremen to load.

(2)

But there was no duty on Spencer to perform Lehigh's duties, i.e., to inspect its barge for repairs, before sending its men aboard No. 79, as pointed out by Judge Bonsal, in denying Lehigh's motion to set aside the verdict (467a-468).

In *Orlando* v. *Prudential S. S. Corp.*, 313 F. 2d 822 (CA2—1963), the Court held there was no such duty, pages 823-4:

> "In the present case the appellant contends that American should be held to have broken its implied warranty of workmanlike service on either of two

theories. The more far reaching, and the one to be first discussed, is the claim that a stevedore is required to inspect a vessel before sending its men aboard to commence work.

"* * * Judge Palmieri found that the unseaworthy condition which caused Orlando's injury had existed for an hour and twenty minutes before any employee of the stevedoring company boarded the vessel; moreover, he found that during that period the company had access to the ship and could have discovered the unseaworthy condition if it had inspected the working area. However, after a scholarly review of the authorities, the Judge concluded that no case had imposed the duty of inspection before beginning operations. We agree with this conclusion."

"* * * And in *Drago* v. *A/S Inger* (E.D.N.Y.) 194 F. Supp. 398, 404-405, aff'd 2 Cir., 305 F. 2d 139, the court did not imply a duty of prior inspection, but held that a stevedore chargeable with constructive notice of a dangerous condition through the knowledge of its employees has a duty to remedy the condition, or to have it remedied. Nor does our reading of *Crumady* v. *The Joachim Hendrik Fisser,* supra, and *Calmar S. S. Corp.* v. *Nacirema Operating Co.,* 4 Cir., 266 F. 2d 79, cert. denied 361 U. S. 816, 80 S. Ct. 56, 4 L. Ed. 2d 62, elicit from those cases any duty of inspection prior to the stevedore's sending aboard a gang of longshoremen. Since no decision has recognized such a duty, and since there was no evidence as to the existence of a custom or practice to that effect, we see no reason to impose such a duty in this case. Cf. The T. J. Hooper, 2 Cir., 60 F. 2d 737, cert. denied 287 U. S. 662, 53 S. Ct. 220, 77 L. Ed. 571."

Same:

Waterman S. S. Co. v. *David* (5 Cir.) 353 F. 2d 660, 666;

Ignatyuk v. *Transp. Chartering Corp.* (2 Cir.) 250 F. 2d 198.

The jury has found, upon the evidence, that no negligence of any employee of Spencer contributed to plaintiff's accident.

Lehigh argues that, contrary to the jury's finding, a substandard performance by Spencer of its stevedoring contract was the proximate cause of the accident, citing *Ryan Steved. Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133, 134. But in *Ryan*, the accident was caused by the manner in which the stevedore stowed the cargo and the stevedore sought to escape liability because the shipowner failed to supervise its work. The reverse is true in the instant case, i.e., the shipowner, which had a duty to furnish a seaworthy vessel and represented to the stevedore the vessel was safe, seeks to avoid liability for its breach of duty by transferring its duty to Spencer, the stevedore. Just as in the *Ryan* case the stevedore could not escape liability by using the shipowner's duty to discover and correct the stevedore's own breach of duty, so here, where Spencer owed no duty to inspect the condition of the vessel, the vessel owner Lehigh cannot use Spencer's failure to discover the defect as an escape from its own contract.

In *Weyerhauser S. S. Co.* v. *Nacirema Oper. Corp.*, 355 U. S. 563, 567, this Court stated that the ship is entitled to indemnity where the stevedore renders substandard performance which led to foreseeable liability of petitioner "*absent conduct on its part* sufficient to preclude recovery".

Note also the decision in *McNamara* v. *Weichel etc.*, 293 F. 2d 900: "This obligation to indemnify may be nullified, however, if Weichel's conduct was such as to preclude recovery."

In *Hudson S. S. Co.* v. *Colon* (1st Cir.) 314 F. 2d 44, the vessel was denied indemnity where it allegedly fixed the

winch after complaints and told the stevedore it was fixed. "Appellant cannot complain that appellee relied upon its instructions" (p. 45). And in *Moore-McCormack Lines* v. *Maryland Ship Ceiling Co.* (4 Cir.) 331 F. 2d 663, wherein ships carpenters were made ill when they went into a hold containing tobacco which had been fumigated after being advised by the ship's relief officer the smell was that of tobacco and there was nothing harmful when he had not made any inquiry. The third-party complaint was dismissed, the jury finding that the ship had assured the stevedore it was safe to send men into the hold, that the stevedore's foreman acted reasonably in sending men into the hold and that the stevedore should not have discovered the gas.

In *Hodgson* v. *Lloyd Brasiliero Patrimonio Nacional* (3 Cir.), 294 F. 2d 32, the vessel sought indemnity from the stevedore on the theory that once the stevedore became aware of the defects in the winch, it was under a duty to cease using it until repaired. But there was testimony that a member of the crew, notified of the defect, worked on it for a while and then told the winchman it was O. K.—to go ahead and the accident occurred on the first or second load thereafter. The Court said, page 34:

> "It was for the jury to determine whether it was unworkmanlike for the stevedoring company to continue operating the winch which it knew had been defective, after receiving a categorical assurance from the shipowner's crew that it was "O. K." The same can be said for the shipowner's argument that the stevedoring company, even before the accident, knew that the winch was defective and that efforts at repair had been unsuccessful. At most, it can be said that these are questions over which reasonable men could differ, and that, as such, they were properly referred to the jury.

"The shipowner refers us to *Calderola* v. *Cunard S.S. Co.*, 2 Cir., 279 F. 2d 475, *Smith* v. *Jugoslavenska Linyska Plovidea*, 4 Cir., 1960, 278 F. 2d 176, *Weigel* v. *The M/V Belgrano*, D. C., D. Or. 1960, 188 F. Supp. 605, and *Hugev* v. *Dampskisaktieselskabet International*, D.C.S. D. Cal. 1959, 170 F. Supp. 601, affirmed, 9 Cir. 274 F. 2d 875, certiorari denied, 1960, 363 U. S. 803, 80 S. Ct. 1237, 4 L. Ed. 2d 1149, which can be readily distinguished, for in none of those cases did the shipowner, as was true here, assure the stevedoring company that the known defects had been repaired."

In *Pacific Far East Line* v. *California Stevedoring & Ballast Co.* (D. Calif.), 238 F. Supp. 956, 959:

"It has been properly recognized, however, that indemnity should be denied whenever the shipowner participates in some way in the decision to work on unsafe, unseaworthy area, for example, by misleading the stevedore company into believing that the condition has been repaired, *Torres Cruz* v. *Hudson Steamship Co.*, 206 F. Supp. 216 (D. Puerto Rico, 1962), affirmed 314 F. 2d 44 (1st Cir., 1963), or that it is actually safe, *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2d 663 (4th Cir. 1962), or by otherwise inducing the stevedore to go on with the work. *United States* v. *Harrison*, 245 F. 2d 911 (9th Cir. 1957).

"Of course, when the stevedore company is not aware of the unseaworthy condition and cannot reasonably be expected to discover it, the rule becomes inapplicable and, absent unworkmanlike performance in some other respect, the stevedore company cannot be held. *Cia Martina Del Nervion* v. *James J. Flanagan Shipping Corp.*, 308 F. 2d 120 (5th Cir. 1962); *Ray* v. *Compania Naviera Continental*, 203 F. Supp. 206 (D. Md. 1962);

Thompson v. *Trent Maritime Co.*, 222 F. Supp. 221 (E. D. Pa. 1963); *Wujek* v. *Compania Sud Americana De Vapores*, 224 F. Supp. 853 (D. Md. 1964). Cf. *Niccoli* v. *Den Norske Afrika-Og Australielinie, etc.*, supra, footnote [332 F. 2d 651 (2 Cir. 1964)]."

The jury having found that no negligence of Spencer contributed to plaintiff's accident, Lehigh was not in any event entitled to indemnity from Spencer for Lehigh's breach of its duty.

(3)

Spencer's duty to Lehigh was clearly charged by Judge BONSAL and Spencer's liability to Lehigh if any, did not turn on their duty to plaintiff.

The Trial Court specifically and clearly charged (453a-454a):

"Now, the stevedoring company is under a contract with the railroad to load its Barge 79, and the stevedoring company was under a duty to perform that task in a reasonably careful and efficient manner and, of course, there was no duty of the Lehigh Valley Railroad to supervise the work being done by the employees of the stevedoring company.

Now, if you find that the negligence of any of the employees of the stevedoring company—and this would include the plaintiff himself—any of the employees of the stevedoring company contributed to the causing of this accident and to Mr. McNeil's injury, then the stevedoring company failed in its obligation to the railroad to perform its duties in a reasonably careful and proper manner.

And therefore, under those circumstances, the Lehigh Valley Railroad is entitled to reimbursement 697) from the stevedoring company for whatever amount the plaintiff recovers.

> So if you should find that there was a hole on this barge deck, and if you should find that the stevedoring company either knew about the hole on the deck or should have known about it, in the exercise of reasonable or ordinary care, then the stevedoring company should have, of course, exercised reasonable prudence to warn its employees about the hole and to tell the railroad about it and to take such steps as would be reasonable to prevent the hole causing any accident."

In *Ryan Steved. Co.* v. *Pan-Atlantic S. S. Co.*, 350 U. S. 124, this Court said, page 132:

> "* * * On the other hand, the shipowner's action for indemnity here is not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to Palazzolo."

And at page 134:

> "* * * Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of cargo, it is clear, that as between themselves, the contractor, as the warrantor of its own services cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense."

Thus, whatever duty Spencer may have owed to its employee, the issue between Lehigh and Spencer was explicitly charged.

The cases cited by Lehigh at pages 11 and 12 of its petition do not support its position that the Trial Court erred in not charging, as to the third-party action, what duty Spencer owed to plaintiff, its employee.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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